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BLIZZARD ENTERTAINMENT, INC.,
et al.,

Plaintiffs,

v.

LILITH GAMES (SHANGHAI) CO.
LTD., et al.,

Defendants.

Case No. 15-cv-04084-CRB

ORDER

**(1) GRANTING IN PART AND
DENYING IN PART LILITH'S
MOTION TO DISMISS, WITH
LEAVE TO AMEND**

**(2) DENYING UCOOL
DEFENDANTS' MOTION TO
DISMISS**

Much like Plaintiffs' popular games, this copyright case has turned into quite the saga. The latest expansion pack, Plaintiffs' Second Amended Complaint ("SAC"), adds allegations against Defendant Lilith's game Soul Hunters, as well as several parties related to Defendant uCool: David Guo, Huwa IP Holdings Ltd. ("HIPH"), and Huwa, Inc. (collectively, "the uCool Defendants"). Lilith and the uCool Defendants move separately to dismiss parts of the SAC. Lilith moves to dismiss all allegations against its game Soul Hunters. See Lilith's MTD (dkt. 216). The uCool Defendants move to dismiss some of the allegations against their game Heroes Charge—namely, those relating to Diablo III, Starcraft II, and Heroes of the Storm. See uCool's MTD (dkt. 228). For the reasons discussed below, Lilith's motion is GRANTED IN PART and DENIED IN PART, with leave to amend. uCool's motion is DENIED.

I. BACKGROUND**A. Factual Background**

According to the SAC, Plaintiff Blizzard is a game developer and copyright owner of some of the most popular computer games of the past decade, including Warcraft III and World of Warcraft (“the Warcraft games”), Starcraft II (“Starcraft”), Diablo III (“Diablo”), Hearthstone, and Heroes of the Storm. SAC (dkt. 210) ¶ 19. Blizzard—along with its co-Plaintiff Valve—also owns copyrights in hundreds of versions of the user-created “mod” to Warcraft III known as Defense of the Ancients (“DotA”). Id. ¶ 34. Additionally, Valve owns copyrights in a stand-alone game modeled on DotA called Dota 2. Id. ¶ 35.

The Warcraft games—as well as DotA and Dota 2—are strategy and role-playing games set in the same fantastical world, Azeroth, which is populated by all sorts of “unusual and distinctive” mythical creatures, including “Night Elves,” “Tauren,” and “Naga.” Id. ¶¶ 22–25. Hearthstone, a digital playing-card game, incorporates characters and images from the Warcraft games and related products. Id. ¶ 19.

Starcraft and Diablo are different and separate franchises from the Warcraft games, taking place in their own separate universes. Starcraft is set in outer space and features a team of space soldiers called “Terran Marines.” Id. ¶ 29. Diablo takes players through a ghoulish world ruled by characters such as “King Leoric, the Skeleton King.” Id.

Heroes of the Storm, an online multiplayer game, brings together the best-known characters from the Warcraft games, Starcraft, and Diablo. Id. ¶ 19. Although Heroes of the Storm was officially released in final form to the public in June 2015, the game was first made available to the public over a year earlier, in March 2014. Id.; see also FAC (dkt. 36) ¶ 11.

Defendant Lilith develops mobile games and is the developer, owner, and distributor of the games Dota Legends and Dot Arena (both names are allegedly references to DotA and Dota 2). SAC ¶¶ 40–41. Dota Legends and Dot Arena are “substantively identical.” Id. ¶ 42. Lilith is also the creator and distributor of Soul Hunters, a “reskin” or “reimplementation” of Dota Legends. Id. ¶ 43. In other words, Soul Hunters is “the same

1 basic game” as Dota Legends but with “some changes to some of the game’s artwork” and
2 “some additional, new, or different” hero characters. Id.

3 The uCool Defendants include several entities—uCool, Huwa, and HIPH—as well
4 as individual David Guo. Id. ¶¶ 12–16. Together, the uCool Defendants developed,
5 marketed, and distributed the mobile game Heroes Charge, with David Guo personally
6 directing and supervising these activities. Id. ¶¶ 46–47. Heroes Charge was the subject of
7 a separate copyright suit between Lilith and uCool, in which Judge Samuel Conti noted
8 “striking similarities between . . . protected elements” of Dota Legends and Heroes
9 Charge. Lilith Games (Shanghai) Co. v. uCool, Inc., No. 15-1267, 2015 WL 5591612, at
10 *9 (N.D. Cal. Sep. 23, 2015); see also SAC ¶ 45.

11 **B. Procedural Background**

12 Two-and-a-half years after the commencement of this case, we are back where we
13 started (perhaps a little wiser but certainly no younger). Along the way, several notable
14 things have happened.

15 In December 2015, Plaintiffs’ original complaint was dismissed, with leave to
16 amend, because Plaintiffs (1) failed to plausibly plead any copyrightable subject matter
17 and (2) made only general allegations of infringement without providing specific,
18 representative acts of infringement. See First Dismissal Order (dkt. 35) at 9–10. Plaintiffs
19 subsequently filed a First Amended Complaint (“FAC”), which not only pled that
20 constituent elements of Plaintiffs’ works, including certain characters, were copyrightable,
21 but also included a set of exhibits with specific, representative examples of alleged
22 infringements. See FAC ¶¶ 14–29, 42–54, Exs. A–D. uCool moved to dismiss the FAC,
23 but at a hearing on April 8, 2016, the Court denied uCool’s motion, noting that the FAC
24 appeared to have “successfully address[ed]” the shortcomings of the original complaint.
25 Trans. of 4/8/16 Hear’g (dkt. 76) at 2. uCool then moved for partial summary judgment on
26 the issue of Valve’s ownership of copyrights in DotA, which was denied. See PSJ Order
27 (dkt. 162).

1 Plaintiffs have now filed a Second Amended Complaint, which differs from their
2 FAC in two material respects. First, Plaintiffs have significantly expanded their references
3 to Lilith's game Soul Hunters and made clear that their allegations of infringement include
4 Soul Hunters. Compare SAC ¶¶ 39–43 with FAC ¶¶ 31–32. Second, Plaintiffs have added
5 other uCool defendants—Huwa, HIPH, and David Guo—whose involvement in the
6 alleged infringement was uncovered during discovery. Compare SAC ¶¶ 45–49, 80–111
7 with FAC ¶¶ 34–35, 66–74. Aside from these two differences, the SAC, like the FAC,
8 alleges that Defendants used in their games specific elements derived from—and
9 substantially similar to—elements contained in Plaintiffs' games, including (1) visual
10 depictions of, and skills given to, individual characters, (2) in-game icon artwork,
11 (3) visual depictions of locations and landmarks, (4) musical compositions, and (5) the
12 overall look and feel. Compare SAC ¶¶ 50–68 with FAC ¶¶ 36–54. The SAC also
13 includes exhibits with representative examples of alleged infringements, very similar to the
14 exhibits attached to the FAC. Compare SAC Exs. A–D with FAC Exs. A–D.

15 Both Lilith and the uCool Defendants move to dismiss parts of the SAC, arguing
16 primarily that Plaintiffs have not plausibly alleged that Defendants copied and infringed
17 Plaintiffs' games. See Lilith's MTD; uCool's MTD.

18

19 II. LEGAL STANDARDS

20 **A. Motion to Dismiss**

21 A complaint must contain “a short and plain statement of the claim showing that the
22 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Accordingly, pursuant to Federal
23 Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action if the
24 complaint fails to allege “sufficient factual matter, accepted as true, to ‘state a claim to
25 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
26 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This means that, though a
27 complaint need not contain “detailed factual allegations,” it must provide more than “a
28 formulaic recitation of the elements of a cause of action,” so as to give the defendant “fair

1 notice of what the . . . claim is and the grounds upon which it rests.” Twombly, 550 U.S.
2 at 555; see also Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (“[A]llegations in a
3 complaint . . . may not simply recite the elements of a cause of action, but must contain
4 sufficient allegations of underlying facts to give fair notice and to enable the opposing
5 party to defend itself effectively.”). For purposes of ruling on a Rule 12(b)(6) motion, the
6 Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings
7 in the light most favorable to the nonmoving party.” Manzarek v. St. Paul Fire & Marine
8 Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

9 **B. Copyright Infringement**

10 To state a claim of copyright infringement, a plaintiff must allege (1) ownership of
11 a valid copyright, and (2) illicit copying of constituent elements of the work that are
12 original. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). Here,
13 Defendants’ motions largely focus on the second prong. This second prong itself requires
14 showing two things: (1) that portions of the plaintiff’s work were in fact copied and
15 (2) that the copying amounts to infringement, that is, “unlawful appropriation.” Arnstein
16 v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); see also Rentmeester v. Nike, Inc., — F.3d —,
17 2018 WL 1055846, at *3 (9th Cir. Feb. 27, 2018). Absent direct evidence of copying,
18 factual copying may be established circumstantially by showing that the infringer had
19 access to the plaintiff’s copyrighted work and that there exist similarities between the two
20 works that are “probative of copying.” Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51
21 (2d Cir. 2003); Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139–40 (2d Cir. 1992); see
22 also Rentmeester, 2018 WL 1055846, at *3. Once factual copying has been established,
23 infringement is determined by comparing the works for “substantial similarity” of
24 protected elements. Laureyssens, 964 F.2d at 139–40; see also Rentmeester, 2018 WL
25 1055846, at *3.

26 Substantial similarity entails a two-part analysis consisting of an “intrinsic” test and
27 an “extrinsic” test. Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th
28 Cir. 1994). The “intrinsic” test asks ““whether the ordinary, reasonable audience’ would

1 find the works substantially similar in the ‘total concept and feel of the works’”—a
2 question that must be left to the finder of fact. Cavalier v. Random House, Inc., 297 F.3d
3 815, 822 (9th Cir. 2002) (quoting Kouf, 16 F.3d at 1045); see also Swirsky v. Carey, 376
4 F.3d 841, 845 (9th Cir. 2004). The “extrinsic” test, meanwhile, is “an objective
5 comparison of specific expressive elements.” Cavalier, 297 F.3d at 822. This involves
6 breaking works down into their constituent elements, distinguishing between protected and
7 unprotected material, and comparing protected elements for proof of copying as measured
8 by “substantial similarity.” See Swirsky, 376 F.3d at 845; see also Apple Comput., Inc. v.
9 Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir. 1994).

10 “[W]hen the copyrighted work and the alleged infringement are both before the
11 court, capable of examination and comparison, non-infringement can be determined on a
12 motion to dismiss” on the ground that the works are not substantially similar. Christianson
13 v. West Pub. Co., 149 F.2d 202, 203 (9th Cir. 1945). Here, however, Plaintiffs have
14 offered only representative examples of the ways in which Defendants’ games are similar
15 to their own, not entire works capable of examination and comparison. Accordingly, the
16 question before the Court is whether Plaintiffs have plausibly alleged substantial similarity
17 and put Defendants on fair notice of their claims. See Baca, 652 F.3d at 1216.

19 III. DISCUSSION

20 A. Lilith’s Motion to Dismiss

21 Lilith moves to dismiss the allegations against its game Soul Hunters on the
22 grounds that Plaintiffs have neither (1) specifically identified the infringed works nor
23 (2) plausibly alleged substantial similarity between each of their games and Soul Hunters,
24 and have therefore failed to state a claim of copyright infringement with respect to Soul
25 Hunters.

26 On the issue of identifying the allegedly infringed works, Lilith’s argument fails.
27 Lilith argues that Plaintiffs have not specifically identified which works Soul Hunters
28 infringes, alleging only generally that Soul Hunters infringes “the Blizzard Works” and

1 “DotA.” See Lilith’s MTD at 6–7, 10–11. Lilith’s co-defendant, however, previously
2 made a similar argument, contending that there was “no way . . . to determine from the
3 face of the Complaint what works are at issue.” Dkt. 20 at 8. This argument was rejected
4 because Plaintiffs’ original complaint adequately “identified numerous allegedly infringed
5 copyrights and their respective owners.” See First Dismissal Order at 6. Plaintiffs’ SAC is
6 no less clear in identifying what works are at issue. See SAC ¶¶ 19–21, 30–35,
7 Schedule A.

8 Identifying the works at issue, though, is only the first step. To survive dismissal of
9 their claims, Plaintiffs must allege facts that plausibly show infringement of their works.
10 The meat of Lilith’s motion argues that Plaintiffs fail to meet this standard. In particular,
11 Lilith argues that Plaintiffs do not sufficiently allege which elements of their games are
12 copyrightable, and which expression(s) from Soul Hunters are substantially similar to any
13 protectable elements. See Lilith’s MTD at 7–10, 11–14. Although Lilith’s argument is
14 largely unpersuasive, there is merit to its arguments regarding Starcraft and Diablo.

15 The Ninth Circuit’s “extrinsic” test for substantial similarity involves three steps:
16 identifying the sources of alleged similarity, distinguishing between protected and
17 unprotected material, and comparing protected elements for substantial similarity. See
18 Swirsky, 376 F.3d at 845; Apple, 35 F.3d at 1443. Here, Plaintiffs’ SAC clearly identifies
19 the sources of alleged similarity, including (1) visual depictions of individual characters, as
20 well as skills and abilities given to them, (2) in-game icon artwork, (3) visual depictions of
21 locations and landmarks, (4) musical compositions, and (5) the overall look and feel. SAC
22 ¶ 52.

23 Plaintiffs’ SAC also sufficiently alleges that the sources of alleged similarity
24 represent copyrightable subject matter. This step is important because not all elements of a
25 copyrighted work are protectable. Unprotected elements include ideas, expressions that
26 are indistinguishable from the underlying ideas (merger doctrine), standard or stock
27 elements (scènes à faire), and facts. See Apple, 35 F.3d at 1444; see also Gorski, 2014 WL
28 3533324, at *4. In particular, a character is protectable only if it (1) generally has

1 “physical as well as conceptual qualities,” (2) is “sufficiently delineated to be recognizable
2 as the same character whenever it appears,” and (3) is “especially distinctive and contain[s]
3 some unique elements of expression.” DC Comics v. Towle, 802 F.3d 1012, 1021 (9th
4 Cir. 2015) (citations and internal quotation marks omitted). Plaintiffs’ SAC provides
5 several representative examples of plausibly copyrightable characters, depictions of
6 landmarks, in-game artwork, and musical compositions. See SAC ¶¶ 23–28, 29, 36, 63–
7 67. For example, the SAC alleges that “Illidan Stormrage” is a “Night-Elf-turned-demon”
8 who is “usually depicted as a muscular purple-skinned night elf with long black hair and
9 intricate tattoos (arcane and tribal in appearance) adorning his torso and arms.” SAC
10 ¶ 25(b). He “wields two long, distinct, bladed weapons,” and when in his “demon form,”
11 has “two long, curved horns growing from his head, and two long, frayed, bat-like wings.”
12 Id. Similarly, the SAC describes the “Dark Portal,” a magical gate in World of Warcraft
13 that features “a dragon head and claws” and “transports characters to the world of
14 ‘Outland.’” SAC ¶ 26. These types of representative examples are enough at the pleading
15 stage. See Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F. Supp. 2d 1114, 1120 (C.D.
16 Cal. 2001) (“Copyright claims need not be pled with particularity.”); cf. First Dismissal
17 Order at 9–10 (holding that a complaint need only allege representative acts of
18 infringement, and dismissing Plaintiffs’ claims for failure to provide such examples).

19 Finally, the SAC compares the alleged protected elements in Plaintiffs’ games to
20 elements of Soul Hunters. See SAC Exs. A–B. For example, the SAC compares a
21 depiction of “Illidan Stormrage” in World of Warcraft to a Facebook ad for Soul Hunters.
22 See SAC Ex. A at 7. The ad shows a character that—like Illidan—carries two long, bladed
23 weapons and has two curved horns growing from its head:

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“Illidan Stormrage” from World of Warcraft



Facebook ad for Soul Hunters

9 Lilith argues that these “comparison[s] of bare images” are not enough because they fail to
10 detail the protected elements of each character and compare them specifically to those in
11 Soul Hunters. See Lilith’s MTD at 9–14; Lilith’s Reply (dkt. 237) at 8–9. But Lilith’s
12 proposed standard is not the pleading standard. Rule 8 requires not “detailed factual
13 allegations” but rather only enough factual matter to show that a claim is “plausible on its
14 face” and to give the defendant “fair notice.” Twombly, 550 U.S. at 555, 570. Here, with
15 respect to most of Plaintiffs’ games, Lilith cannot reasonably argue that the SAC and its
16 exhibits fail to provide fair notice or enough factual matter showing that Plaintiffs’ claims
17 are plausible on their face. In particular, the SAC and its exhibits allege several
18 representative examples of Soul Hunters infringing the Warcraft games, DotA, and Dota 2.
19 See SAC Exs. A and B. And though Lilith suggests that Plaintiffs provide no specific
20 allegations of Soul Hunters infringing Hearthstone and Heroes of the Storm, see Lilith’s
21 MTD at 8, Plaintiffs in fact do provide representative examples of infringement with
22 respect to both games. See SAC Ex. A at 4 and 9.

23 Moreover, to the extent that there are different versions of these games—that is,
24 different versions of the Warcraft games, DotA, Dota 2, Hearthstone, and Heroes of the
25 Storm—Plaintiffs need not provide examples of infringement with respect to each version.
26 Although each version of Plaintiffs’ games constitutes a separate work, see 17 U.S.C.
27 § 101, here Plaintiffs have sufficiently alleged that the copyrightable elements in their
28 games are consistent across different versions. See, e.g., SAC ¶ 22 (“The creatures that

1 inhabit the Warcraft universe are depicted visually within the games and appear
2 consistently throughout the Warcraft games.”). Therefore, in this case, what particular
3 version any alleged representative example of infringement comes from is not especially
4 relevant: to the extent that Plaintiffs have sufficiently alleged infringement with respect to
5 one version of one of their games, they have sufficiently alleged infringement with respect
6 to every version of that game. See id. at 1023–24. Because Plaintiffs sufficiently allege
7 representative examples with respect to at least one version of the Warcraft games, DotA,
8 Dota 2, Hearthstone, and Heroes of the Storm, they state a plausible claim of infringement
9 against Soul Hunters with respect to these games.

10 With respect to Diablo and Starcraft, however, Lilith’s argument has more merit.
11 Lilith argues that Plaintiffs do not plausibly allege substantial similarity between Soul
12 Hunters and Diablo and Starcraft. See Lilith’s MTD at 7–8. Lilith is right: although the
13 SAC plausibly alleges copyrightable elements in both Starcraft and Diablo, it contains no
14 specific examples (representative or otherwise) of Soul Hunters allegedly infringing these
15 copyrightable elements. See SAC ¶¶ 29, 59. The SAC indicates that Diablo and Starcraft
16 are entirely different franchises from the Warcraft games; they are set in different
17 universes and have different characters. Id. ¶ 29. Nothing in the SAC suggests that any of
18 the representative examples of Soul Hunters infringing Plaintiffs’ other games (Warcraft,
19 DotA, Dota 2, Hearthstone, Heroes of the Storm) extend to Diablo or Starcraft.

20 The SAC does specifically allege that characters from Dot Arena (another Lilith
21 game) infringe Diablo and Starcraft. See id. ¶ 59. But the SAC also notes that Dot Arena
22 and Soul Hunters have different artwork and characters. See id. ¶ 43. Accordingly,
23 plausible allegations against Dot Arena do not equate to plausible allegations against Soul
24 Hunters.

25 Thus, the SAC fails to state a plausible claim that Soul Hunters infringes Diablo and
26 Starcraft, and Lilith’s motion is GRANTED with respect to these two games. To be clear,
27 only the Diablo and Starcraft claims against Soul Hunters are dismissed; those against
28 Lilith’s other games are not.

B. uCool's Motion to Dismiss

The uCool Defendants move to dismiss claims against Heroes Charge relating to Starcraft, Diablo, and Heroes of the Storm. They argue that (1) “aggregating” Plaintiffs’ games is not a legally cognizable theory, (2) Heroes Charge is not substantially similar to Diablo or Starcraft, and (3) Plaintiffs cannot plead access to Heroes of the Storm because Blizzard released it to the public after Heroes Charge was released. These arguments fail.

1. “Aggregation” Theory

The uCool Defendants argue first that Plaintiffs are not allowed to “mix-and-match elements from multiple works to manufacture substantial similarity.” uCool’s MTD at 7. This argument mischaracterizes Plaintiffs’ allegations. Plaintiffs allege that the uCool Defendants infringed several of Plaintiffs’ games—including Warcraft, Starcraft, and Diablo—by copying protected elements in each of those games. See SAC ¶¶ 1, 52, 59. Plaintiffs are not relying on an “aggregation” theory. See *id.*; see also Opp. (dkt. 235) at 9–10.

2. Infringement of Diablo and Starcraft

Plaintiffs clearly and specifically allege that the depictions of “War Chief” and “Rifleman” in Heroes Charge are substantially similar to (and thus infringe) protected expression in Diablo and Starcraft—namely, “King Leoric” from Diablo and “Terran Marine” from Starcraft, respectively. See SAC ¶ 59.

The uCool Defendants, however, note that “War Chief” and “Rifleman” are merely two characters out of 135 characters in Heroes Charge, and therefore, there is no substantial similarity. See uCool’s MTD at 10, 14. It appears that the uCool Defendants are arguing that their alleged copying is de minimis—that is, the alleged copying is so trivial that it does not rise to the level of substantial similarity. See *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004); Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997). But the uCool Defendants get the rule backwards. The relevant inquiry is not whether a substantial portion of the defendant’s work was derived from the plaintiff’s work but whether protectable material in the plaintiff’s work was

1 substantially appropriated. See Worth v. Selchow & Righter Co., 827 F.2d 569, 570 n.1
2 (9th Cir. 1987). “A taking may not be excused merely because it is insubstantial with
3 respect to the infringing work.” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S.
4 539, 565 (1985) (emphasis in original). Thus, that the uCool Defendants may not have
5 appropriated 133 other characters from one of Plaintiffs’ games does not mean Plaintiffs
6 have failed to plausibly allege that the uCool Defendants copied protectable expression in
7 Diablo and Starcraft. Moreover, because Plaintiffs are not required to plead every instance
8 of infringement, their claims are not necessarily limited to “War Chief” and “Rifleman.”
9 Cf. Perfect 10, 167 F. Supp. 2d at 1120 (“Requiring a statement of each and every example
10 would defeat the regime established by Rule 8.”).

11 The uCool Defendants also contend that “King Leoric” and “Terran Marine” are
12 “generic” and therefore not copyrightable. uCool’s MTD at 12. The uCool Defendants
13 may be correct that “skeleton kings” and “space soldiers”—stock characters in the video
14 game context—constitute unprotected expression under the scènes à faire doctrine. See
15 Capcom, 2008 WL 4661479, at *6. But Plaintiffs allege a variety of features that are not
16 “generic” in the video game context. For example, the SAC describes King Leoric as
17 having “long white hair and beard, distinctive armor, a red loincloth and a spiky gold
18 crown.” SAC ¶ 29. Additionally, the SAC describes Terran Marine as wearing “a
19 distinctive set of giant blue space armor with huge, oversized shoulder pads, a fully-
20 enclosed helmet with round tubes protruding from it, and a yellow faceplate.” Id. It also
21 emphasizes Terran Marine’s “comically oversized rifles that are often at least one-half the
22 size of the entire suit of armor.” Id. Finally, the SAC provides visual depictions of both
23 King Leoric and Terran Marine, which highlight Plaintiffs’ particular expression of the
24 idea of “skeleton kings” and “space soldiers.” Id.

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6 “Leoric” from Diablo III and Heroes of the Storm

“Terran Marine” from Starcraft II

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8 Plaintiffs plausibly allege protectable expression in Diablo and Starcraft that “War Chief”
9 and “Rifleman” infringe.

10

3. Access to Heroes of the Storm

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The uCool Defendants contend that it is not plausible that they had access to Heroes
12 of the Storm because Heroes of the Storm was not “published” until June 2015, and Heroes
13 Charge was released in August 2014. See uCool’s MTD at 15; see also SAC ¶ 45. The
14 uCool Defendants attach multiple exhibits to their reply showing that Heroes of the Storm
15 was “published” in June 2015, including a copy of Blizzard’s registration with the
16 Copyright Office and complaints in other court proceedings. See Reply (dkt. 240) at 13–
17 15 and exhibits. Plaintiffs allege that Heroes of the Storm “first was released to the public
18 in March 2014.” SAC ¶ 19; see also FAC ¶ 11.

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When ruling on a motion to dismiss, a court may take judicial notice of registrations
20 with the Copyright Office as well as court documents already in the public record. See
21 Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2002); Vigil v. Walt Disney Co., 1995 WL
22 621832, at *1–2 (N.D. Cal. Oct. 16, 1995). Whether the June 2015 publication date is true
23 or not, however, is not determinative at this stage. First, proof of access is not necessary to
24 show copying. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)
25 (“in the absence of any proof of access, a copyright plaintiff can still make out a case of
26 infringement by showing that [the works are] ‘strikingly similar’”). Moreover, that Heroes
27 of the Storm was “published” in June 2015 does not, as a practical matter, necessarily
28 contradict Plaintiffs’ claim that the game was “first . . . released to the public” in March

1 2014. For example, certain members of the public may have been allowed to test the game
2 before it was “published” and widely released in June 2015. In fact, in their FAC,
3 Plaintiffs alleged:

4 Beginning in March 2014, Blizzard released to members of the
5 public the game “Heroes of the Storm,” an online multiplayer
6 game that brings together Blizzard’s best-known characters
7 from each of its major game franchises. Heroes of the Storm
8 was released to the public in final form in June 2015 and was
9 highly publicized for years before its release.

10 FAC ¶ 11. Because the pleadings at this stage are construed in the light most favorable to
11 the Plaintiffs, uCool’s argument fails. Finally, Plaintiffs’ SAC provides a number of
12 specific, representative examples of alleged infringement between Heroes Charge and
13 Heroes of the Storm. See, e.g., SAC Ex. A at 1–2, 4, 16. Plaintiffs therefore have stated a
14 plausible claim of copyright infringement. Cf. First Dismissal Order at 10 (holding that “a
15 plausible claim would require that Plaintiffs submit a representative sampling of infringed
16 content”). uCool’s motion is accordingly DENIED.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Lilith’s motion to dismiss is GRANTED IN PART and
19 DENIED IN PART. Lilith’s motion is granted only with respect to allegations that Soul
20 Hunters infringes Diablo and Starcraft. With respect to all other allegations against Soul
21 Hunters, Lilith’s motion is denied without prejudice. uCool’s motion is DENIED without
22 prejudice.

23 Plaintiffs are given leave to amend their Diablo and Starcraft allegations. Any
24 amended complaint shall be filed by March 29, 2018. Extensions of time in which to file
25 motions to dismiss will not be granted except on a particularized showing of good cause.

26 **IT IS SO ORDERED.**

27 Dated: March 8, 2018



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CHARLES R. BREYER
United States District Judge